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IN THE
Supreme Court of the United States
October Term, 1957

No. 655

BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner*,

v.

CHARLES V. SMITH, and OTHERS OF RAILWAY CONDUCTORS AND BRAKEMEN GENERAL COMMITTEE OF ADJUSTMENT FOR THE BALTIMORE AND OHIO RAILROAD and THE BALTIMORE AND OHIO RAILROAD COMPANY, a Maryland corporation, *Respondents*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 835

BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner,*

v.

CHARLES V. SMITH, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN GENERAL COMMITTEE OF ADJUSTMENT FOR THE BALTIMORE AND OHIO RAILROAD and THE BALTIMORE AND OHIO RAILROAD COMPANY, a Maryland corporation, *Respondents.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

On April 28, 1958, the Court denied the petition for certiorari herein (not yet reported; see 26 Law Week 3310).

On the same day, the United States Court of Appeals for the Seventh Circuit rendered its opinion in *McNamar* v. *Baltimore and Ohio Chicago Terminal Railroad Co., et al.,* F. 2d (not yet reported; printed as Appendix A hereto). That decision conflicts with the opinion of the Sixth Court of Appeals in this case, as hereinafter shown, and is an intervening circumstance of substantial effect within the meaning of Rule 58.

The facts in *McNamar* are closely similar to those here. In both cases, the plaintiffs were members of, and subject to a Union Shop Agreement held by, the Brotherhood of Railroad Trainmen. McNamar, on March 1, 1952, and the plaintiff herein, on July 1, 1952, voluntarily relinquished their membership in the BRT. McNamar, in July, 1953, joined the Switchmen's Union of North America, an organization admittedly national in scope, as the plaintiff herein joined the Order of Railway Conductors on April 1, 1956 (Petition for certiorari, p. 5). Both were cited for this violation of the union shop agreement. McNamar was discharged on October 22, 1954, and brought suit in the United States District Court for Northern Indiana for damages for wrongful discharge. That Court granted summary judgment for the defendants (including the Brotherhood of Railroad Trainmen), *McNamar* v. *Baltimore and Ohio Chicago Terminal Railroad Company,* 135 F. Supp. 835, which action the Court of Appeals affirmed.

To reach this result, the Seventh Court of Appeals explicitly, or by necessary implication, was required to decide four issues in a manner contrary to the holding of the Sixth Court of Appeals in this case. First it concluded, unlike the Court in this case, that McNamar's voluntary relinquishment of membership in the BRT constituted adequate grounds for discharge. It said (App. p. 2a),

> . . . it is clear this plaintiff was not a member of any qualified labor organization during the sixty day period after he quit the defendant Brotherhood . . . McNamar breached the Union Agreement and the Railroad discharged him upon demand of its co-defendant [the BRT].

Second, the Seventh Court of Appeals expressly rejected the plaintiff's reliance on *Steele* v. *Louisville and Nashville Railroad Co.*, 323 U. S. 192 (dealing with racial discrimination) stating that this "is much too narrow a holding for the plaintiff" (App. p. 3a). The Sixth Court of Appeals in this case rested its opinion on Steele (Petition for certiorari, p. 14a), as the ground for holding that the District Court had jurisdiction.

Third, by necessary implication, the Seventh Court of Appeals in *McNamar* held that the plaintiff's belated acquisition of membership in the Switchmen's Union did not cure his prior default. McNamar joined that organization over a year before his discharge. In holding that he had no cause of action, the Court necessarily concluded that such after-acquired membership was insufficient to deprive the defendant railroad and labor organization of the right to procure his discharge because of his breach of the agreement. In this case, the Court of Appeals held that Smith's after-acquired membership in the ORC was sufficient to protect him from discharge. (Petition for certiorari, pp. 15a, 16a).

Fourth, the Seventh Court of Appeals held that McNamar's belated acquisition of membership in the Switchmen's Union did not constitute "changing membership from one organization to another organization" within the meaning of Section Eleventh (c) of the Railway Labor Act (Petition for certiorari, p. 23a). That Court pointed out that "this plaintiff was not a member of any qualified labor organization during the sixty day period after he quit the defendant Brotherhood" (App. p. 2a), and correctly considered that this made him vulnerable to the penalty

provided for a breach of the agreement. In this case, the Court of Appeals relied on the after-acquired membership in the ORC to excuse the admitted default (Petition for certiorari, p. 15a, 16a).

Because McNamar sued for damages, rather than for an injunction as in this case, the Seventh Court of Appeals felt that *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630 (1941) was controlling, so as to give the District Court jurisdiction (App. p. 3a). It made it clear, however, that it adhered to its ruling in *United Railroad Operating Crafts et al.* v. *Pennsylvania Railroad et al.*, 212 F. 2d 938 (1954), holding that where, as here, injunctive relief is sought, exclusive primary jurisdiction is vested in the National Railroad Adjustment Board. (Id.) In this case, the Sixth Court of Appeals held that that doctrine did not apply. (Petition for certiorari, pp. 7, 14a).

The decision of the Seventh Court of Appeals in *McNamar* demonstrates the conflict among the Court of Appeals on these issues. Additionally, it serves to emphasize the importance of these questions in the administration of the Railway Labor Act, and in the administration of agreements entered into pursuant to that Act, discussed at pp. 13-14 of our petition for certiorari. The decision of the Seventh Court of Appeals in *McNamar* would have required a holding in this case a) that the National Railroad Adjustment Board had exclusive primary jurisdiction of the matter and b) that the parties had adequate grounds for disciplining plaintiffs. The operations of the carriers, and of the labor organizations representing their employees, are carried on within both these judicial circuits. It cannot be anticipated that one set of rules will govern, rather than another, because of the hap-

penstance that a plaintiff brings his action in a District Court within one, rather than another, Circuit. The results must be gross inequities as between employees, and grave uncertainties in the administration of such agreements, until this Court resolves the conflict. The large number of cases now pending (Petition for certiorari, p. 12 fn. 7) make it desirable that this be done as promptly as possible.

In order to terminate the confusion and uncertainty which will necessarily result from allowing these conflicting decisions to stand, we urge that the Court reconsider its denial of the petition herein, and grant review.

Respectfully submitted,

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Certificate

I, Gerhard Van Arkel, one of counsel for the petitioners in this cause, certify that the foregoing Petition for Rehearing is filed in good faith and not for purposes of delay and that the Petition is restricted to an intervening circumstance of substantial effect: the decision of the Seventh Court of Appeals of April 28, 1958 in *McNamar* v. *Baltimore and Ohio Chicago Terminal Railroad Co.*, F.2d. .

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GERHARD VAN ARKEL

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12135 SEPTEMBER TERM 1957, JANUARY SESSION, 1958

WILLIAM P. McNAMAR,
Plaintiff-Appellant,
v.
BALTIMORE & OHIO CHICAGO TERMINAL RAILROAD COMPANY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

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April 28, 1958

Before FINNEGAN, SCHNACKENBERG and PARKINSON, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* McNamar, plaintiff railroad switchman, sued his former railroad employer, Baltimore & Ohio Chicago Terminal Railroad Company and, the statutory bargaining representative, Brotherhood of Railway Trainmen, in the Lake Superior Court, Indiana, to recover damages for plaintiff's dismissal from railroad service for failure to comply with the union shop agreement concerning members of plaintiff's craft. After the cause was removed to the United States District Court, a motion for summary judgment was allowed on the facts based upon the reasons and grounds reported in *McNamar v. Baltimore & Ohio Chicago Terminal R. Co.*, 153 F. Supp. 835 (D.C. Ind. 1957); this appeal followed.

Plaintiff insists his is an Indiana common law tort action "for a third party conspiring with a party to

a contract, to cause its breach." Obviously an existing contract is indispensable for the foundation of plaintiff's action for procuring its breach and if McNamar violated the Union Shop Agreement he cut ground from under himself. On the other hand if, somehow, a contract was extant between plaintiff and his employer, these defendants were justified in taking the action now complained of. See *e.g. Bohnen* v. *Baltimore & Ohio Chicago Terminal R. Co.*, 125 F. Supp. 463 (D.C. Ind. 1954) where McNamar was also a plaintiff in an action about which the district judge explained, *inter alia:*

> "The gravamen of the plaintiffs' complaint in the instant case is that the Brotherhood of Railroad Trainmen refused reinstatement only to those members of UROC who were active in that organization and that the Brotherhood offered and did accept back those members of UROC who were not active in that organization. Plaintiffs say this constitutes discrimination and that their discharge by the employer is a violation of Section 2, Eleventh (a) of the Railway Labor Act, 45 U.S.C.A. § 152, since the cause of their non-membership in the Brotherhood of Railroad Trainmen is not the failure to pay dues but rather, is a policy of the Brotherhood not to reinstate them because of their previous activities in the rival union; that their discharge is the result of hostile discrimination by the bargaining representative and that therefore the district court has initial jurisdiction to issue an injunction under the principle of *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 65 St. Ct. 226, 89 L. Ed. 173".

From what that same district judge concluded in the current situation about McNamar it is clear this plaintiff was not a member of any qualified labor organization during the sixty day period after he quit the defendant Brotherhood and fact finding at a trial simply would not bridge that hiatus. McNamar breached the Union Agreement and the Railroad discharged him upon demand of its co-defendant. Rule 56, Federal Rules of Civil Pro-

cedure, 28 U.S.C. having been repeatedly discussed in our opinions, needs no further exposition in this case. See *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480 (1957).

Moore v. *Illinois Central R. Co.*, 312 U.S. 630 (1941) was decided before the decision in *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480 (1957) and McNamar seeks money damages rather than reinstatement or prevention of discharge from employment. Our opinion in *United Railroad Operating Co.* v. *Pennsylvania R. Co.*, 212 F. 2d 938 (7th Cir. 1954) is distinguishable on the jurisdictional problem because it was to restrain the defendant Railroad from discharging plaintiffs. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192 (1944) is much too narrow a holding for this plaintiff. In this case, and only on these facts, we will assume plaintiff did not have to exhaust his administrative remedies available at the System Board level before resorting to his purported action for damages. The motion for summary judgment was correctly allowed and that is the narrow ground of our disposition.

Judgment affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.